MOTION FILED
JAN 3 2001

(4)

No. 00-906

IN THE
Supreme Court of the United States

COUNTY OF ERIE, PENNSYLVANIA,
Petitioner,

v.

ERIE COUNTY RETIREES ASSOCIATION, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Motion for Leave to File Brief *Amicus Curiae* and Brief of *Amici Curiae* American Association of Health Plans, Inc., American Benefits Council, Blue Cross Blue Shield Association Chamber of Commerce of the United States of America, and Health Insurance Association of America in Support of Petitioner

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

This case concerns the circumstances under which an employer may be held liable under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), for offering Medicare-eligible retirees health benefits that differ from those it offers to retirees who are not eligible for Medicare. Pursuant to Rule 37.2(b) of the rules of this Court, the American Association of Health Plans, Inc., the American Benefits Council, Blue Cross Blue Shield Association, the Chamber of Commerce of the United States of America, and the Health Insurance Association of America (collectively "*amici*") respectfully move this Court for leave to file the brief *amicus curiae* in support of Petitioner that has been lodged with this motion.

Amici have contacted the parties to this dispute to obtain permission to file this brief. Petitioner County of Erie, Pennsylvania, consented to the filing. Respondent Erie County Retirees Association declined to grant such consent.

As a group, *amici* represent a broad array of interests affected by the decision below. The American Association of Health Plans, Inc ("AAHP") is the national association for the managed health care community. Its membership includes health maintenance organizations (HMOs), preferred provider organizations (PPOs), third party health benefit administrators, health care utilization review organizations, prepaid limited health service plans, and other integrated health care delivery systems. AAHP represents more than 1000 managed health care organizations serving nearly 140 million Americans. AAHP's mission is to advance health care quality and affordability through leadership in the health care community, advocacy, and the provision of services to member health plans.

The American Benefits Council ("ABC"), formerly known as the Association of Private Pension and Welfare Plans, is a broad-based, non-profit trade association founded to protect and foster the growth of this Nation's privately-sponsored employee benefit plans. The members of ABC include both small and large employer sponsors of employee benefit plans, as well as plan support organizations, such as consulting and actuarial firms, investment firms, banks, insurers and other professional benefit organizations. Collectively, its more than 250 members sponsor and administer plans covering more than 100 million plan participants.

The Blue Cross Blue Shield Association comprises 47 independent, locally operated Blue Cross and Blue Shield Plans. Through relationships with employers, employee benefits plans, and direct contracts with subscribers, the Blue Cross and Blue Shield companies provide health insurance to private and public employees and individuals, including fee-for-service programs, health maintenance organizations, preferred provider organizations, and a variety of other offerings. They also provide third-party administrative services to private and public employee benefits plans. Collectively, the Blue Cross Blue Shield companies furnish health care coverage to 78 million – or one in four – Americans, making them (as a group) the largest U.S. entity offering health insurance and benefits.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation and serves as the principal voice of the business community. The Chamber represents an underlying membership of nearly three million businesses and organizations, with 140,000 direct members, in every size, sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus* briefs in this Court on issues of national concern to American business.

The Health Insurance Association of America ("HIAA"), based in Washington, D.C., is one of the largest associations of health insurance companies in the world. HIAA is an advocate for the private, market-based health insurance system. Its more than 290 members provide medical expense and supplemental insurance, as well as long-term care insurance and disability income protection to more than 123 million Americans. HIAA develops and advocates federal and state policies which build upon our health care system's quality, affordability, accessibility and responsiveness.

Because they believe the perspective of *amici* and their members would assist the Court in assessing the potential impact of the ruling below on private-sector employee benefit plans and related businesses, *amici* ask that this Court grant their motion for leave to file a brief *amicus curiae*.

Respectfully submitted,

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January 3, 2001

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BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF HEALTH PLANS, INC., AMERICAN BENEFITS COUNCIL, BLUE CROSS BLUE SHIELD ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI*[1]

The American Association of Health Plans, Inc. ("AAHP") is the national association for the managed health care community. Its membership includes health maintenance organizations (HMOs), preferred provider organizations (PPOs), third party health benefit administrators, health care utilization review organizations, prepaid limited health service plans, and other integrated health care delivery systems. AAHP represents more than 1000 managed health care organizations serving nearly 140 million Americans. AAHP's mission is to advance health care quality and affordability through leadership in the health care community, advocacy, and the provision of services to member health plans.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity other than *amici curiae* and their members made a monetary contribution to the preparation or submission of this brief.

include both small and large employer sponsors of employee benefit plans, as well as plan support organizations, such as consulting and actuarial firms, investment firms, banks, insurers and other professional benefit organizations. Collectively, its more than 250 members sponsor and administer plans covering more than 100 million plan participants.

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supplemental insurance, as well as long-term care insurance and disability income protection to more than 123 million Americans. HIAA develops and advocates federal and state policies which build upon our health care system's quality, affordability, accessibility and responsiveness.

This case concerns the circumstances under which an employer may be held liable pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, for offering Medicare-eligible retirees health benefits that differ from those it offers to retirees who are not eligible for Medicare. As such, this case is of great importance to *amici* as representatives of businesses and private benefit plan sponsors subject to the ADEA, as well as of health care insurers and managed care organizations. *Amici* file this brief to urge the Court to grant *certiorari* in this case.

REASONS FOR GRANTING THE PETITION

The decision below will subject otherwise bona fide employer-sponsored retiree health plans in both the private and public sector to ADEA challenge based on their relative treatment of those retirees who are Medicare eligible and those who are not. This result is directly contrary to the definitive legislative history of the Older Workers Benefit Protection Act ("OWBPA"). Amici are very concerned that this decision will discourage the establishment and maintenance of these voluntary and socially important programs. The flaws in the decision of the court of appeals are discussed in depth in the Petition and will not be separately treated here. Rather, the purpose of this brief is to emphasize the serious policy implications of the Third Circuit's ruling, not only for public sector employers such as the Petitioner, but for the entire community of private employee benefit plans, their participants, and their service providers.

Private employers, like public entities, are subject to the strictures of the ADEA. But, unlike those of governmental

employers, private employee benefit plans are also subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), the "comprehensive and reticulated statute" that broadly regulates benefit plan administration. *See* ERISA § 4(a), (b)(1), 29 U.S.C. § 1003(a), (b)(1); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). And the strong congressional policy of ERISA, echoed by OWBPA's managers, is to avoid discouraging the creation and maintenance of benefit plans by subjecting them to overly burdensome regulation. Because it fails to respect the balance struck by Congress between protecting the interests of employees in receiving promised benefits free from unlawful discrimination and those of employers in structuring their benefit arrangements as they see fit, the decision below undermines the important federal policies of ERISA which Congress intended to preserve in enacting the OWBPA.

I. FEDERAL POLICY MANDATES CAUTION IN THE REGULATION OF EMPLOYEE BENEFIT PLANS

As explained in the Petition, the provisions of the ADEA at issue in this case were enacted in 1990 as part of OWBPA. *See* Pet. at 10. During consideration of that legislation, its managers recognized that over-regulation of benefit plans was counter to long-standing federal policy. Senator Orrin Hatch, a principal sponsor of the compromise that became OWBPA, explained that

> It has been our policy to encourage employers to provide generous employee benefits. Clearly, this objective is frustrated, if not defeated, if Congress enacts legislation that so heavily encumbers American companies that they must reduce or eliminate such benefits.
>
> . . . .

> We must be concerned about the impact on all employees of additional Federal requirements that unnecessarily complicate existing arrangements or that will shift a firm's resources from actual benefits into regulatory compliance or litigation.
>
> If an employer is forced to reduce or eliminate benefits for some workers to avoid litigation exposure or to avoid going afoul of the law, we have to ask the question: Is it worth it?

136 Cong. Rec. 25357 (1990). The resulting legislation, Senator Hatch further explained, was intended to "protect older workers' rights to fair and equitable benefits without disrupting the variety of employer-sponsored policies that benefit all workers." *Id.*

The concern that intrusive regulation ultimately could harm American workers by discouraging employers from offering generous benefits is a realistic one in light of ERISA's general approach to benefit plan regulation. As this Court has recognized, "[n]othing in ERISA requires employers to establish employee benefit plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Rather, particularly with respect to welfare plans such as those providing retiree health benefits, "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate" their plans. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).[2] *See also, e.g., Hughes Air-*

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[2] ERISA defines "welfare plan" as "any plan, fund, or program . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their

(Continued . . .)

craft Co. v. Jacobson, 525 U.S. 432, 441 (1999) (noting that private parties and not the government determine the level of plan benefits); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 551, 569 (1979) (same).

Nor was ERISA's non-regulation of benefit levels an oversight on Congress's part; it was instead a deliberate choice. Thus, ERISA's legislative history is replete with expressions of concern for the dangers of over-regulation. Congress particularly made an effort to avoid encouraging "employers to respond" to its regulatory efforts "by decreasing benefits under existing plans or slowing the rate of formation of new plans." H.R. Rep. No. 807, 93d Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682.[3] ERISA's statutory scheme reflects Congress's recognition of "the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

This Court, through its recognition of the so-called "settlor doctrine," has been diligent in protecting the discretion that ERISA purposely reserved to plan sponsors. Plan par-

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beneficiaries . . . medical, surgical, or hospital care or benefits . . . ." ERISA § 3(1), 29 U.S.C. § 1002(1). Unlike pension plans, welfare plans are not subject to ERISA's minimum standards for participation, vesting, or funding. *See Curtiss-Wright*, 514 U.S. at 78.

[3] *See also id.* at 69 ("Employees, as a whole, might be injured rather than aided if . . . cost increases resulted in slowing down the growth or perhaps even eliminat[ing] private retirement plans."); 120 Cong. Rec. 29928 (1974) (comments of Sen. Williams) (increasing costs to the point that employers terminate their plans "[c]ertainly . . . is not the intent of this legislation which is designed to improve and encourage the expansion of private pension plans").

ticipants have often argued that employer action in altering the terms of its plan to the participants' detriment, even where not expressly prohibited by ERISA, constituted a breach of the employer's fiduciary duty to act solely in the interest of plan participants. *See generally* ERISA § 404(a), 29 U.S.C. § 1104(a). Without exception, such efforts have been rejected by this Court on the ground that "[w]hen employers undertake those actions [of adopting, modifying, or terminating their plans], they do not act as fiduciaries . . . but rather are analogous to the settlors of a trust." *Lockheed Corp.*, 517 U.S. at 890; *accord Pegram v. Herdrich*, 120 S. Ct. 2143, 2153 (2000); *Hughes Aircraft*, 525 U.S. at 443-44; *Curtiss-Wright*, 514 U.S. at 78.

The court below erred in failing to heed the concerns voiced by OWBPA's managers and in ignoring the role of ERISA and its policies. While ERISA was not implicated in the precise case before it, the court's ruling applies equally to private benefit plans that are subject to ERISA. In the current climate of increasing health care costs and decreasing employer-provided retiree medical benefits, as described in the following section, the decision below can only further encourage the reduction or elimination of such retiree health benefits.

II. THE NUMBER OF EMPLOYER-SPONSORED RETIREE MEDICAL PLANS IS DECLINING WHILE THE COST OF SUCH PLANS IS ON THE RISE

The Petition presents data showing that the practice of providing different levels of benefits to retirees based on Medicare eligibility is wide-spread in both the public and private sector. *See* Pet. at 26-28. Some of those same sources also confirm that "[t]he prevalence of coverage [for retirees] has declined" during the 1990s, "with some employers dropping coverage and few newer companies adding it."

The Henry J. Kaiser Family Foundation, RETIREE HEALTH COVERAGE: RECENT TRENDS AND EMPLOYER PERSPECTIVES ON FUTURE BENEFITS at 3 (Oct. 1999) ("Kaiser Study").

Even when coverage has not been eliminated altogether, employers have amended their programs making them less generous. For example, among 498 large employers the Kaiser Study reported an increase from 1991 to 1998 of 19 percentage points in the number of employers who required retirees over age 65 to contribute to the cost of their coverage. *Id.* at 5. During that same period, employers who placed caps on their own financial obligation increased by 40 percentage points. *Id.* at 6. And, also during the 1990s, the practice of requiring higher age and service for eligibility increased by 19 percentage points. *Id.* The outlook for the future is even more disturbing, with fully 81 percent of 600 respondents reporting that they would seriously consider increasing premiums and cost-sharing for retirees over 65 in the next three to five years. *Id.* at 9. These changes in retiree coverage have been felt by the courts in the form of the recent proliferation of litigation involving employer changes to retiree medical benefits.[4]

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[4] *See, e.g., Curtiss-Wright*, 514 U.S. 73; *Maurer v. Joy Technologies, Inc.*, 212 F.3d 907 (6th Cir. 2000); *Algren v. Pirelli Armstrong Tire Corp.*, 197 F.3d 915 (8th Cir. 1999); *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. BVR Liquidating, Inc.*, 190 F.3d 768 (10th Cir. 1999); *Pabst Brewing Co. v. Corrao*, 161 F.3d 434 (7th Cir. 1998); *International Ass'n of Machinists & Aerospace Workers v. Masonite Corp.*, 122 F.3d 228 (5th Cir. 1997); *American Fed. of Grain Millers v. International Multifoods Corp.*, 116 F.3d 976 (2d Cir. 1997); *Pisciotta v. Teledyne Indus.*, 91 F.3d 1326 (9th Cir. 1996); *Stewart v. KHD Deutz of Am. Corp.*, 75 F.3d 1522 (11th Cir. 1996); *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 57 F.3d 1255 (3d Cir. 1995); *United Paperworkers Int'l*

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That employers are considering such steps is not surprising in light of the recent rise in the cost of health care. According to a 2000 report by Towers Perrin, a prominent benefits consulting firm, "[f]or large employers, the year 2000 is bringing a double-digit rise in employee and retiree health care costs – the largest since the early 1990s." Towers Perrin, HEATH CARE COST SURVEY at 2 (Jan. 2000) ("TP Survey"). Specifically as to retirees, the survey found that employer costs of coverage for Medicare eligible retirees increased by 24 percent for 2000. *Id.* at 3. In general, "this year's survey shows a rapidly escalating increase in retiree medical costs across the board." *Id.* at 8. Like the Kaiser Study, the TP Survey found that more than half of the employers (57 percent) had responded to these cost pressures by changing their plans' designs and cost-sharing features and that 48 percent were considering adopting such changes.

These circumstances could well produce severe consequences for retirees and their families. Faced with ever-increasing costs, more employers are likely to terminate their retiree medical coverage altogether. Even for those plans that remain in place, the practice of imposing greater and greater costs on the retirees themselves could force retirees to opt out of the coverage. Subjecting employers to ADEA challenge for engaging in the common practice of taking Medicare eligibility in account in structuring their retiree health programs can only add to these pressures to reduce or eliminate coverage.

In light of these clear trends, this Court should continue its vigilance in preserving balances struck by Congress in

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Union v. Champion Int'l Corp., 908 F.2d 1252 (5th Cir. 1990); *Keffer v. H.K. Porter Co.*, 872 F.2d 60 (4th Cir. 1989).

both ERISA and the OWBPA by reversing the decision below.

CONCLUSION

For the reasons stated above and in the Petition, the Court should grant the Petition and issue a writ of certiorari to review the decision of the court of appeals.

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